

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMOND ROMELL SMITH,

Defendant-Appellant.

---

UNPUBLISHED

May 20, 2014

No. 314216

Wayne Circuit Court

LC No. 12-008501-FC

Before: GLEICHER, P.J., and BORRELLO and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his waiver trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82. Defendant was sentenced to 3 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, and time served for the felonious assault conviction. On appeal, defendant raises issues relative to sentencing. He argues that offense variable ("OV") 14 was inaccurately scored, in part because the trial court relied on inaccurate sentencing information. Defendant also argues error in the scoring of ("PRV") 7 because it was a violation of his double jeopardy protections to be convicted of both felonious assault and assault with intent to do great bodily harm less than murder. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

This appeal arises from an altercation between defendant, defendant's cousin, Tyrone Smith and the victim, Terrance Gamble, Sr. Two days prior to the altercation that led to this appeal, defendant had approached Gamble on his front porch and made comments regarding Gamble's mother, Gloria Gamble, who was also present on the porch. This led to an altercation between defendant and Gamble which resulted in defendant getting "beat up" by Gamble. Two days later, Gamble's mother and was sitting on her neighbor's front porch when she saw defendant and Smith walking toward Gamble. When the three men got near each other, Tyrone "sucker-punched" Gamble and defendant began hitting Gamble. Gloria saw defendant hit Gamble "in a stabbing motion." Gamble began fighting back, but defendant grabbed Gamble's leg and threw him to the ground. While Gamble was lying on the ground, defendant and Tyrone punched him repeatedly in the eye, jaw, head, and thigh. During the fight, defendant yelled, "Stomp that mother fucker! Kill that mother fucker!"

Gloria, her niece, and two neighbors broke up the fight and pulled defendant and Tyrone off of Gamble. Defendant ran away, but Tyrone remained near the scene of the incident and denied that Gamble had been stabbed when he heard Gloria state as much to the police over the telephone.<sup>1</sup> When Gamble stood up from the ground, Gloria saw what she thought was a thorn, but what turned out to be a small knife, protruding from Gamble's neck. Gamble was transported to the hospital where he received three to four stitches for each of his five stab wounds and was prescribed Tylenol for his pain.

At the end of trial, the prosecution requested, in closing arguments, that defendant be found guilty of assault with intent to murder or, in the alternative, assault with intent to do great bodily harm less than murder. The trial judge found defendant guilty of both assault with intent to do great bodily harm less than murder and felonious assault. At sentencing,<sup>2</sup> the trial court found that defendant was the leader in a multiple offender situation, and therefore, scored offense variable ("OV") 14 at 10 points. Further, because defendant was convicted of both felonious assault and assault with intent to do great bodily harm less than murder, prior record variable ("PRV") 7 was scored at 10 points. Based on these findings, the trial judge sentenced defendant to 3 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction and time served for the felonious assault conviction.

On appeal, defendant argues that the trial court erred in assessing 10 points under offense variable ("OV") 14 because the trial court failed to make a factual analysis regarding its conclusion that defendant was the leader in a multiple offender situation. Defendant argues that Smith was the individual who first punched Gamble and though defendant had a knife, the knife was not used to initiate the fight. Defendant argues that defendant did not start or encourage Smith to start the fight, hence the trial court erred in its scoring.

When this Court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court's findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

"Offense variable 14 is the offender's role." MCL 777.44(1). Under MCL 777.44(1)(a), if a defendant was "a leader in a multiple offender situation," OV 14 should be scored at 10 points. If a defendant was not a leader in a multiple offender situation, OV 14 should be scored at zero points. MCL 777.44(1)(b). A "multiple offender situation" is a "situation consisting of more than one person violating the law while part of a group." *People v Jones*, 299 Mich App

---

<sup>1</sup> We cannot ascertain with certainty from the record evidence presented on appeal whether the police were called while Gamble was still outside or after he had been taken inside the house.

<sup>2</sup> The trial court made its findings relative to OV 14 and PRV 7 then adjourned the sentencing when it became clear that the presentence investigation report had inaccurate employment information.

284, 287; 829 NW2d 350 (2013), vacated in part on other grounds 494 Mich 880 (2013). In scoring OV 14, the entire criminal transaction should be considered. MCL 777.44(2)(a); *People v Lockett*, 295 Mich App 165, 184; 814 NW2d 295 (2012).

At sentencing, the trial judge found that defendant had waited to attack the victim until defendant had somebody to assist him with the attack. Gamble testified that he saw defendant alone approximately four times after their first altercation and prior to the stabbing, but defendant never attempted to fight him. Further, at trial, the prosecution presented evidence that only defendant had a knife, and that defendant's cousin did not know the attack would involve a knife because defendant's cousin denied that the victim had ever been stabbed. Additionally, the victim's mother testified that defendant directed defendant's cousin to "stomp" and "kill" the victim during the attack. The only evidence to show that defendant was not the leader was testimony that defendant's cousin, not defendant, threw the first punch. However, this evidence does not outweigh the fact that defendant was the only individual (1) with a knife, (2) who had a motive, and (3) who knew the victim had been stabbed. Therefore, the trial judge did not clearly err in finding that defendant was the "leader" in the assault because he had planned the attack on the victim and waited until he had another individual to assist him in committing the assault.

Second, this Court must determine "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute." *Hardy*, 494 Mich at 438. If the facts show that defendant was the "leader" in a "multiple offender situation," OV 14 should be scored at 10 points. MCL 777.44(1)(a). In this case, defendant and defendant's cousin both violated the law by assaulting the victim accordingly, this case involves a "situation consisting of more than one person violating the law while part of a group," *Jones*, 299 Mich App at 287. Our review of the evidence presented in this case clearly provides a preponderance of evidence leading to the trial court's conclusions that defendant was the leader in attacking the victim. There was evidence of a prior encounter in which defendant got "beaten up" by the victim, evidence that defendant encountered the victim alone at least four times after the incident and did not engage in any assaultive behavior. Hence, as the trial court found, it was not until defendant had "assistance" in beating the victim that he undertook assaultive actions, including ordering his cousin to continue the beating. We therefore conclude that OV 14 was properly scored at 10 points.

Defendant next contends that his double jeopardy rights were violated by his convictions for both felonious assault and assault with intent to commit great bodily harm less than murder, which arose out of the same fight. Additionally, defendant contends that the trial court erred in assessing 10 points under prior record variable ("PRV") 7 because he should not have been convicted for both of his assault charges.

A double jeopardy issue presents a significant constitutional question to be considered on appeal regardless of whether the defendant raised it before the trial court. *People v McGee*, 280

Mich App 680, 682; 761 NW2d 743 (2008). Defendant never raised the issue of double jeopardy before the trial court, hence the issue of double jeopardy was not preserved.<sup>3</sup>

Generally, a double jeopardy claim presents a question of law subject to a de novo review on appeal. *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008). However, our review is for plain error. *McGee*, 280 Mich App at 682. “Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant.” *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). The third element generally requires a showing of prejudice—that the error affected the outcome of the proceedings. *People v Borgne*, 483 Mich 178, 196; 768 NW2d 290 (2009), reh gtd in part on other grounds 485 Mich 868 (2009). Finally, “reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial.” *Pipes*, 475 Mich at 274.

Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1 § 15. “The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense.” *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). The purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant’s interest in not enduring more punishment than was intended by the legislature. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003). The validity of multiple punishments is determined under the “same elements standard” for purposes of both the United States and Michigan Constitutions. *United States v Dixon*, 509 US 688, 698; 113 S Ct 2849; 125 L Ed 2d 556 (1993); *People v Gibbs*, 299 Mich App 473, 489; 830 NW2d 821 (2013). Under the “same elements” test, “[i]f each offense requires proof of elements that the other does not . . . no double jeopardy violation is involved.” *People v Baker*, 288 Mich App 378, 382; 792 NW2d 420 (2010).

In *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007) our Supreme Court reversed a decision of this Court and held that convictions for both felonious assault and assault with intent to do great bodily harm were not precluded on double jeopardy grounds because the crimes have different elements. *Strawther*, 480 Mich at 900.<sup>4</sup> The Court stated, in relevant part: “The Court of Appeals erred in concluding that the defendant’s convictions for both assault with intent to commit great bodily harm (MCL 750.84) and felonious assault (MCL 750.82) violated his double jeopardy protections. Because the crimes have different elements, the defendant may

---

<sup>3</sup> While we acknowledge that defendant raised the claim of double jeopardy in a motion to remand, he did not do so before the trial court, hence the issue is not preserved. *McGee*, 280 Mich App at 682. However, even if this Court were to review the issue as preserved, such a finding would not have any effect on this Court’s analysis or conclusions on this issue.

<sup>4</sup> Supreme Court orders that include a decision with an understandable rationale are binding on this Court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006).

be punished for each. *People v Smith*, 478 Mich 292; 733 NW2d 351 (2007).” This Court has since noted the Supreme Court’s holding and its precedential effect. *People v Strickland*, 293 Mich App 393, 401-402 & n 26; 810 NW2d 660 (2011). Therefore, whether this claim was preserved or unpreserved, defendant’s argument that his double jeopardy rights were violated is without merit. *Strawther*, 480 Mich at 900.

Defendant also argues that because the trial court used both the felonious assault and the assault with intent to do great bodily harm less than murder convictions in scoring PRV 7, the trial court erred. To preserve an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range, the challenging party must raise the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. MCL 769.34(10); *People v Jackson*, 487 Mich 783, 795-796; 790 NW2d 340 (2010). Defendant argued in his motion to remand that his constitutional double jeopardy protection precluded his convictions for both of the assault charges against him, and therefore, he could only be convicted of a single crime and should not have been assessed points under PRV 7. This Court denied defendant’s motion for remand.<sup>5</sup>

As previously stated, when this Court reviews a claim that the scoring of the sentencing guidelines was erroneous, the trial court’s findings of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *Hardy*, 494 Mich at 438.

Pursuant to MCL 777.57(1)(b), a defendant should be assessed 10 points for PRV 7 if the defendant “has 1 subsequent or concurrent conviction.” In scoring PRV 7, the appropriate points must be assessed if the defendant was convicted of multiple felony counts. MCL 777.57(2)(a). Having found that defendant’s double jeopardy rights were not violated by his convictions for both felonious assault and assault with intent to do great bodily harm less than murder, *Strawther*, 480 Mich at 900, the trial court properly found that defendant was convicted of concurrent felonies. Such a finding supports the trial court’s scoring of 10 points under PRV 7. Accordingly, we find no error. *Hardy*, 494 Mich at 438.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Stephen L. Borrello  
/s/ Deborah A. Servitto

---

<sup>5</sup> *People v Demond Romell Smith*, unpublished order of the Court of Appeals, entered September 5, 2013 (Docket No. 314216).